PT Wijaya Karya (Persero) TBK & Anor v Zecon Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(C)(A)-1971–10 OF 2021
RAVINTHRAN, AZIMAH OMAR AND NOORIN BADARUDDIN JJCA
13 MAY 2025

Arbitration — Award — Challenge on award — Respondents challenged final arbitration award that was in favour of appellants — Appellants appealed against High Court's decision in setting aside award — Whether there was valid arbitration agreement between parties — Whether dispositive portion of award was clear — Whether there was breach of rules of natural justice in relation to arbitration proceeding — Arbitration Act 2005 s 9(1)

The first respondent's wholly owned subsidiaries, Zecon Land Sdn Bhd and Zecon Petrajaya Sdn Bhd, were awarded a design and build contract for the development of Mydin-Retail Mall in Kuching ('the project'). For the implementation of the project, the first respondent engaged the first appellant for the scope of project management services and manpower supply for the superstructure works. The first respondent and the first appellant had entered into a project management services agreement ('PMSA1') for the provision of the services for the contract sum of RM13,830,591. Subsequently, the nominee and agent of the first respondent and first appellant, namely the second respondent and the second appellant entered into a project management service agreement ('PMSA2') for the contract sum of RM11,485,397. Each of the two agreements contained a dispute resolution clause. The appellants later issued a notice of arbitration against the respondents. The disputes between the appellants and the respondents arose on: (a) the non-payment by the respondents that eventually led to the termination/suspension of PMSA1 and PMSA2 of the appellants; and (b) the alleged non-performance issued under the appellants' extension of time application. The appellants claimed for, inter alia, outstanding sum, interests and general damages. The final arbitration award ('the award') was in favour of the appellants. The respondents challenged the award vide an originating summons. The High Court in setting aside the award found that: (i) there was no single arbitration agreement made between all four parties to refer their disputes under the PMSA1 between the first appellant and the first respondent and/or PMSA2 to the arbitral tribunal at all material time and hence it was not valid within the definition of 'arbitration agreement' under s 9(1) of the Arbitration Act 2005 ('the Act'); (ii) the dispositive portion of the award failed to identify a party to perform the award and a party to benefit from the award resulting in the award to be uncertain as to its meaning, effect, impact and/or duties imposed; and (iii) there was a breach of the rules of natural justice based

on the manner the arbitration proceedings were conducted in particular, the arbitrator's finding that the second appellant and second respondent were the agent to their principal, the first appellant and the first respondent. Hence, this appeal.

Held, allowing the appeal:

(1) Both PMSA1 and PMSA2 were for the same scope of works and as such the learned arbitrator's finding of agency was fortified. The learned arbitrator was factually and legally right in finding that the first appellant and first respondent were both liable to each other under PMSA1 and their agents, the second appellant and the second respondent under the PMSA2. The learned arbitrator did not err in finding that the first appellant and first respondent were the proper parties in the international arbitration via PMSA1, whilst the second appellant and the second respondent were in the same international arbitration in their capacity as agents to their principals, the first appellant and first respondent (see paras 28 & 30).

(2) The learned High Court judge erred in setting aside the award on the ground that there was no single arbitration agreement made between all four parties herein and to refer the PMSA1 and PMSA2 to the arbitral tribunal at all material time and not valid within the definition of 'arbitration agreement' under s 9(1) of the Act. PMSA2 was a supplementary or collateral agreement, existed contemporaneously with the principal agreement, PMSA1. The first appellant and first respondent had consented, through their conduct, assigned their contractual obligation under the primary agreement, PMSA1 to their respective nominee, namely the second appellant and second respondent with the aim to facilitate the administration of contract. The dispositive portion of the award was clear in that the first respondent being the principal to the second respondent was liable to the first appellant being the principal to the second appellant (see paras 33–34).

(3) The appellants could not be said to be unjustly enriched at the expense of the first respondent by receiving damages under the award. Based on the agency principle, the first respondent as the principal and controller to the second respondent was to be held liable to pay the awarded sum to the first appellant being the principal to the second appellant. The learned arbitrator had not applied the wrong regime of law and she had not gone wrong with respect to the proper parties to the arbitration. The core principle as to the need for an arbitral agreement required by s 9(1) of the Act existed in the form of PMSA1 and PMSA2 each being a complete agreement for the same rights and obligations, for the same scope of

works. To render an arbitral award to be set aside, the breach must be significant or serious such as to have had an impact on the outcome of the arbitration (see paras 35, 37 & 39).

[Bahasa Malaysia summary

Anak syarikat milik penuh responden pertama, Zecon Land Sdn Bhd dan Zecon Petrajaya Sdn Bhd, telah dianugerahkan kontrak reka dan bina untuk pembangunan Mydin-Retail Mall di Kuching ('projek'). Untuk pelaksanaan projek tersebut, responden pertama telah melantik perayu pertama untuk skop perkhidmatan pengurusan projek dan bekalan tenaga kerja untuk kerja-kerja superstruktur. Responden pertama dan perayu pertama telah memeterai perjanjian perkhidmatan pengurusan projek ('PMSA1') untuk penyediaan perkhidmatan bagi jumlah kontrak sebanyak RM13,830,591. Kemudian, penama dan ejen responden pertama dan perayu pertama, iaitu responden kedua dan perayu kedua, telah memeterai perjanjian perkhidmatan pengurusan projek ('PMSA2') bagi jumlah kontrak sebanyak RM11,485,397. Setiap daripada kedua-dua perjanjian tersebut mengandungi klausa penyelesaian pertikaian. Perayu kemudiannya mengeluarkan notis timbang tara terhadap responden. Pertikaian antara perayu dan responden timbul berhubung: (a) kegagalan pembayaran oleh responden yang akhirnya membawa kepada penamatan/penggantungan PMSA1 dan PMSA2 perayu; dan (b) dakwaan ketidaksempurnaan pelaksanaan yang dikeluarkan di bawah permohonan lanjutan masa perayu. Perayu menuntut, antara lain, jumlah tertunggak, faedah dan ganti rugi am. Award timbang tara akhir ('award') memihak kepada perayu. Responden mencabar award tersebut melalui saman pemula. Mahkamah Tinggi dalam mengetepikan award tersebut mendapati bahawa: (i) tiada perjanjian timbang tara tunggal yang dibuat antara kesemua empat pihak untuk merujuk pertikaian mereka di bawah PMSA1 antara perayu pertama dan responden pertama dan/atau PMSA2 kepada tribunal timbang tara pada setiap masa material dan oleh itu ia tidak sah dalam definisi 'perjanjian timbang tara' di bawah s 9(1) Akta Timbang Tara 2005 ('Akta'); (ii) bahagian dispositif award gagal mengenal pasti pihak untuk melaksanakan award tersebut dan pihak untuk mendapat manfaat daripada award tersebut yang mengakibatkan award tersebut tidak pasti dari segi makna, kesan, impak dan/atau tugas yang dikenakan; dan (iii) terdapat pelanggaran kaedah keadilan semula jadi berdasarkan cara prosiding timbang tara dijalankan khususnya, dapatan penimbang tara bahawa perayu kedua dan responden kedua adalah ejen kepada prinsipal mereka, perayu pertama dan responden pertama. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Kedua-dua PMSA1 dan PMSA2 adalah untuk skop kerja yang sama, dan oleh itu, dapatan penimbang tara yang bijaksana mengenai agensi diperkukuhkan. Penimbang tara yang bijaksana adalah betul dari segi

fakta dan undang-undang dalam mendapati bahawa perayu pertama dan responden pertama kedua-duanya bertanggungjawab antara satu sama lain di bawah PMSA1 dan ejen mereka, iaitu perayu kedua dan responden kedua, di bawah PMSA2. Penimbang tara yang bijaksana tidak terkhilaf dalam mendapati bahawa perayu pertama dan responden pertama adalah pihak yang wajar dalam timbang tara antarabangsa melalui PMSA1, manakala perayu kedua dan responden kedua adalah dalam timbang tara antarabangsa yang sama dalam kapasiti mereka sebagai ejen kepada prinsipal mereka, iaitu perayu pertama dan responden pertama (lihat perenggan 28 & 30).

(2) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam mengetepikan award atas alasan bahawa tiada perjanjian timbang tara tunggal yang dibuat antara kesemua empat pihak di sini untuk merujuk PMSA1 dan PMSA2 kepada tribunal timbang tara pada setiap masa material, dan ia tidak sah dalam definisi 'perjanjian timbang tara' di bawah s 9(1) Akta. PMSA2 adalah perjanjian tambahan atau kolateral, yang wujud serentak dengan perjanjian utama, iaitu PMSA1. Perayu pertama dan responden pertama telah bersetuju, melalui tingkah laku mereka, untuk menyerahkan kewajipan kontrak mereka di bawah perjanjian utama, iaitu PMSA1, kepada penama masing-masing, iaitu perayu kedua dan responden kedua, dengan tujuan untuk memudahkan pentadbiran kontrak. Bahagian dispositif award tersebut adalah jelas, iaitu responden pertama sebagai prinsipal kepada responden kedua bertanggungjawab kepada perayu pertama sebagai prinsipal kepada perayu kedua (lihat perenggan 33–34).

(3) Tidak boleh dikatakan bahawa perayu-perayu diperkaya secara tidak adil dengan mengorbankan responden pertama dengan menerima ganti rugi di bawah award tersebut. Berdasarkan prinsip agensi, responden pertama sebagai prinsipal dan pengawal kepada responden kedua hendaklah bertanggungjawab untuk membayar jumlah yang diawardkan kepada perayu pertama sebagai prinsipal kepada perayu kedua. Penimbang tara yang bijaksana tidak menggunakan rejim undang-undang yang salah dan beliau tidak terkhilaf berhubung pihak yang wajar kepada timbang tara tersebut. Prinsip teras mengenai keperluan untuk perjanjian timbang tara yang dikehendaki oleh s 9(1) Akta tersebut wujud dalam bentuk PMSA1 dan PMSA2 yang setiap satunya merupakan perjanjian lengkap untuk hak dan kewajipan yang sama, bagi skop kerja yang sama. Untuk menjadikan sesuatu award timbang tara boleh diketepikan, pelanggaran tersebut mestilah signifikan atau serius sehingga memberi impak kepada hasil timbang tara tersebut (lihat perenggan 35, 37 & 39).]

Cases referred to

Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc [2023] 4 MLJ 113; [2023] 4 MLRA 338, CA (refd)

Mahanagar Telephone Nigam Ltd v Canara Bank & Ors 2019 SCC Online SC 995, SC (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198; [2020] 6 MLRA 51, FC (folld)
Padda Gurtaj Singh & Ors v Axiata Group Bhd & Ors [2022] MLJU 526; [2022] MLRHU 454, HC (refd)
Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors [2020] 3 MLJ 1; [2020] 5 CLJ 143, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 9(1), 18(7), 20, 37, 38
Contracts Act 1950

Appeal from: *Zecon Bhd & Anor v PT Wijaya Karya (Persero) TBK & Anor* [2021] MLJU 3069 (High Court, Kuching)

Arthur Lee Cheng Chuan (with Sylvester Lai Tze Yang) (Arthur Lee, Lin & Co) for the appellants.
Sim Hui Chuang (Lim Lip Sze) (Reddi & Co) for the respondents.

Noorin Badaruddin JCA:

[1] This appeal arises from the High Court's decision on 1 October 2021 setting aside the final arbitration award dated 25 January 2021 ('the award') which was in favour of the appellants. The appellants were the 'claimants' and the respondents as 'respondents' in the International Arbitration No AIAC/INT/ADM-610–2018C of which the seat was in Kuching Sarawak, Malaysia. The award was delivered by a sole arbitrator, Ms Tan Swee Im.

BRIEF FACTS

[2] The first respondent, Zecon Bhd is a public company incorporated under the laws of Malaysia.

[3] The second respondent, Zecon Construction (Sarawak) Sdn Bhd is incorporated under the laws of Malaysia and is a subsidiary of the first respondent.

[4] The first appellant, PT Wijaya Karya (Persero) TBK is a company incorporated under the laws of Republic of Indonesia.

[5] The second appellant, Wijaya Karya Perseron Sdn Bhd is a private

limited company incorporated under the laws of Malaysia.

[6] The first respondent wholly owned subsidiaries, Zecon Land Sdn Bhd and Zecon Petrajaya Sdn Bhd were awarded a design and build contract for the development of Mydin-Retail Mall in Kuching ('the project').

[7] For the implementation of the project, the first respondent engaged the first appellant for the scope of project management services and manpower supply for the superstructure works.

[8] On 13 August 2014, the first respondent and the first appellant had entered into a project management services agreement Contract No MY-1/14/W ('PMSA1') for the provision of the services for the contract sum of RM13,830,591.

[9] On 12 November 2014, the nominee and agent of both first respondent and first appellant, namely the second respondent and second appellant entered into a project management service agreement Contract No MY-1/14/W-AMD ('PMSA2') for the contract sum of RM11,485,397.

[10] Each of the two agreements contained a dispute resolution clause stated in cl 13 respectively as follows:

> Clause 13 — Dispute Resolution
>
> All disputes between the Parties in relation to this agreement shall be principally settled amicably by the PARTIES. In case of the THE PARTIES could not settle their dispute amicably, such dispute shall be taken into Arbitration for the final and binding settlement. Such arbitration shall take place in Kuala Lumpur, pursuant to KLRCA (Kuala Lumpur Regional Centre for Arbitration) rules and shall be conducted in English.

[11] On 20 June 2018, the appellants issued notice of arbitration against the respondents through their solicitors, Messrs Arthur Lee, Lin and Co Advocates.

[12] Ms Tan Swee Im was appointed as the sole arbitrator for the aforesaid international arbitration by the Director of the AIAC and the acceptance of Ms Tan Swee Im was confirmed on 18 April 2019 and at all material times her appointment received no challenge by the parties herein.

[13] During the course of arbitration and pursuant to Procedural Order No 1 dated 24 May 2019 and the subsequent updated Procedural Order No 1A dated 3 September 2019, the parties to the arbitration amongst others agreed that the seat of arbitration was to be amended from Kuala Lumpur to Kuching,

Sarawak and the arbitration is governed by the Arbitration Act 2005 and the AIAC Arbitration Rules 2018.

[14] In essence, the disputes between the appellants and the respondents arose on:

(a) the non-payment by the respondents that eventually led to the termination/suspension of PMSA1 and PMSA2 of the appellants; and

(b) the alleged non-performance issued under the appellants extension of time application dated 19 January 2005.

[15] Summarily, the claims by the appellants during the arbitration are as follows:

(a) the outstanding sum of RM6,731,753.61 (exclusive of GST);

(b) interest against the respondents at the rate of 12.5%pa for delay/non-payment for the period of August 2014-July 2016, in the sum of RM1,176,196.26 as of 11 August 2016;

(c) interest at the rate of 5%pa on the said outstanding sum of RM6,731,743.61 from the due date as at 28 July 2016 until and final settlement of the outstanding sums;

(d) general damages being loss of business profit to be assessed;

(e) costs; and

(f) any other relief which the arbitral tribunal deem just and appropriate to grant.

[16] In denying the appellants' claims, the respondents counterclaimed as follows:

(a) declaration that the works done by the appellants in the sum of RM11,485,397;

(b) that the appellants do jointly and severally pay the respondents the total sum of RM6,122,041.37 and/or any other sum/amount the arbitral tribunal deems fit;

(c) interest where appropriate;

(d) costs; and

(e) any other relief that the arbitral tribunal deems fit and proper to grant.

[17] In accordance with r 12(1) of the AIAC Arbitration Rules, the arbitral proceedings were declared closed on 30 December 2020 save for the issue of costs. In compliance with r 12(2) of the AIAC Rules, the learned arbitrator's

draft final award save as to costs was submitted to the AIAC for technical review on 8 January 2021. Following the conclusion of the technical review on 25 January 2021, the final award save as to costs was finalised.

[18] The award states as follows:

(1) THAT in respect of the Claimant's claim for RM6,731,753.61 (exclude GST) being the outstanding progress claims, costs of materials, tools, labour and mobilization costs under PMSA1 and PMSA2, the Respondent shall pay the Claimant the sum of RM4,617,471.70; and

(2) THAT the Respondent's Counterclaim for RM6,122,041.37 is dismissed;

(3) THAT the Claimant is awarded interest on the sum of RM4,617,471.70 at the rate of 5% per annum from 31 October 2016 until date of receipt by the Claimant of full payment;

(4) THAT Costs are reserved to a further award to be published;

(5) THAT the Respondent shall make payment to the Claimant immediately and without delay from the date of this Final Award Save as to Costs, the sum of RM4,617,471.70 together with interest thereon at the rate of 5% per annum from 31 October 2016 until date of receipt by the Claimant of full payment.

[19] Vide Originating Summons No KCH-24C(ARB)-1/3 of 2021 ('the OS'), the respondents as plaintiffs therein, challenged the award on the following grounds:

(a) there is no valid arbitration agreement to which all the plaintiffs and the defendants have subjected it under the laws of Malaysia;

(b) the award is in conflict with the public policy of Malaysia in that there was never any valid arbitration agreement between the parties under the Arbitration Act 2005 ('the Act') and/or the New York Convention;

(c) the award is in conflict with the public policy of Malaysia in that there is a serious irregularity in the making of the award; and

(d) the award is in conflict with the public policy of Malaysia in that a breach of natural justice occurred during the arbitral proceedings and/or in connection with the making of the award.

[20] The learned High Court judge agreed with the respondent. The learned High Court judge's findings can be summarised as follows:

(a) that there is no single arbitration agreement made between all four parties herein, to refer their disputes under the PMSA1 dated 13 August 2014 between the first appellant and the first respondent and/or PMSA2

to the arbitral tribunal at all material time and hence it is not valid within the definition of 'arbitration agreement' under s 9(1) of the Arbitration Act 2005;

(b) that the dispositive portion of the award failed to identify a party to perform the award and a party to benefit from the award resulting in the award to be uncertain as to its meaning, effect, impact and/or duties imposed; and

(c) that there was a breach of the rules of natural justice based on the manner the arbitration proceedings were conducted in particular, the learned arbitrator's finding that the second appellant and second respondent are the agent to their principal, the first appellant and the first respondent.

FINDINGS

[21] At the outset, it is important to state the finding of facts by the learned arbitrator and they are as follows:

(a) the notice of arbitration dated 20 June 2018 was commenced by the appellants where the first appellant being the principal and the second appellant being the nominee against the respondents where the first respondent being the principal and the second respondent being the nominee, pursuant to cl 13 of the PMSA1 which is an agreement between the first appellant and the first respondent;

(b) both PMSA1 and PMSA2 contain identical provision as the parties' rights and obligations under the contract. This dispute resolution clause, inter alia, the arbitration agreement and the governing law clauses are also identical; and

(c) as the subject of the arbitration was commenced as a single international arbitration, and thereafter by agreement, all parties subsequently agreed to submit their pleadings as a single international arbitration. The parties agreed that the preliminary issues whether there are two separate arbitrations under each of the PMSA1 and PMSA2 with separate legal entities in each arbitration, of which the arbitration under PMSA1 to be an international arbitration and under the PMSA2 to be a domestic arbitration, and/or whether the first appellant and first respondent ought to be excluded from the arbitration, as PMSA2 was allegedly claimed by the respondents to have been superseded the PMSA1 (the respondent's jurisdictional challenge), to be joined and dealt with together with the merits of the dispute. This parties' agreement is reflective in the tribunal's order for Direction No 1A dated 3 September 2019 which were both issued on parties' consent.

[22] Consequently, the parties have pleaded as follows:

> The respondents expressly pleaded that the first appellant and the first respondent (being the principals) should not be parties to the arbitration because PMSA2 is not a supplementary agreement to PMSA1 and that the appellants had already nominated and assigned the second appellant and the second respondent to carry out their obligations under the PMSA2 respectively;
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> On the other hand, the appellants pleaded that PMSA2 is a supplementary or collateral agreement, exist contemporaneously with the principal agreement, PMSA1. Both the first appellant and the first respondent had willingly, through their conduct, assigned their contractual obligation under the primary agreement, PMSA1 to their respective nominee, namely second appellant and second respondent with the aim to facilitate the administration of contract.

[23] Foremost, we find that it is undisputed that the parties had consented to the jurisdiction of the tribunal as reflected in the tribunal's order for Direction No 1 dated 24 May 2019, and/or order for Direction No 1A dated 3 September 2019 which states:

> this arbitration was commenced as a single international arbitration. Parties agree to submit their pleadings as a single international arbitration and consider these issues as they arise in the pleadings. If appropriate, this may be dealt with as a Preliminary issue.

[24] We further find that the respondents had also consented that their jurisdiction challenge was to be joined and dealt with by the arbitral tribunal together with the merits of the dispute towards the end. Since parties had mutually agreed, we are of the considered view that the arbitral tribunal rightfully exercised its power to investigate and decide its own jurisdiction relating to the respondents' jurisdictional challenge under the doctrine of *kompetenz-kompetenz* in accordance with s 18(7) of the Act which states that:

> 18(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

[25] We are also of the considered view that the respondents' jurisdictional challenge/preliminary issues were closely connected with the merits of the dispute and that it is impossible to determine one without the other.

[26] The essence of the finding of facts by the learned arbitrator can be summarised as follows:

(a) that the parties to the original contract vis a vis PMSA1 have not agreed to any new contract, nor to rescind or alter the original contract. The intention of the parties as gleaned from the wording of PMSA2 does appear to be for the first appellant and first respondent to have their respective subsidiaries and/or nominees to take over the works including Recital E, cll 3.2 and 4 of the PMSA2;

(b) on the evidence, PMSA1 continues to exist. The parties to PMSA2 by themselves did not have the capacity to rescind, or alter, or novate PMSA1, and no cogent basis has been advanced by the respondents to enable them to do so;

(c) PMSA1 and PMSA2 subsist, each being a complete agreement for the same rights and obligations, for the same scope of works;

(d) an implicit agency has been established with the wholly subsidiary companies, the second appellant and the second respondent acting as agent for its controllers/principals ie the holding companies who are the first appellant and the second respondent. The controllers/principals are to be liable for the wholly owned subsidiary's act on normal agency principals as provided for in the Contracts Act 1950; and

(e) that the contracting parties did not intend to contract with the subsidiaries but rather with the respective principal.

[27] The learned arbitrator then found on the balance of probabilities that:

(a) there is an implied conferral of authority by the first appellant and the first respondent as principals, to the second appellant and the second respondent respectively, to act as their agents or, as 'nominee' as per the word used in PMSA2;

(b) the first appellant and first respondent are liable to each other under PMSA1 and for their respective agents, the second appellant and second respondent under PMSA2;

(c) the first appellant and first respondent are properly and rightfully parties to the arbitration; and

(d) that, any reference in the award to claimant shall refer to the first claimant as principal and second claimant as agent. Similarly references to the respondent shall refer to first respondent and second respondent as agent.

[28] We agree with the findings made by the learned arbitrator. We find that both PMSA1 and PMSA2 are for the same scope of works and as such the learned arbitrator's finding of agency is fortified. Further, the wordings of PMSA2 convey the intention for PMSA2 was to replace PMSA1 and the parties thereto. This could be gleaned, inter alia, from:

a) Recital E:

> F. NOW THEREFORE, the Parties, i.e. ZECON Bhd and PT WIJAYA KARYA had agreed to nominate their nominees to carry out their obligations under the Agreement referred to in Recital D in their stead: ZECON Bhd's nominee shall be ZECON CONSTRUCTION (SARAWAK) SDN BHD

(Company No: 751751 and the nominee for PT

WIJAYA KARYA shall be WIJAYA KARYA PERSERO SDN BHD

(Company No: 1114450-T). In consideration of the mutual covenants and premises herein contained, THE PARTIES agree as follows:

b) Clause 3.2

3.2 The commencement date has a retrospective effect, to wit, seven (7) days from the signing date of the PMS AGREEMENT Contract No MY-1/14/W-AMD signed between ZECON Bhd and PT Wijaya Karya (Persero) Tbk, which this current PMS AGREEMENT replaces in its entirety.

c) Clause 4

4. SCOPE AND LIABILITY

For the purpose of this Agreement, the PARTIES agree to assume the rights and obligations of the Party nominating them in respect of the PMS AGREEMENT Contract No. MY-1/14/W-AMD signed between ZECON Bhd and PT Wijaya Karya (Persero) Tbk and for the purpose of this current Agreement, agree to distribute the scope of liabilities as follows:

[29] However, the parties to PMSA2 did not have the capacity to rescind or alter or novate the PMSA1 and there was no rescission or alteration or novation of PMSA1, executed by both the first appellant and first respondent as principal companies. We further find that there was no dispute that PMSA2 was entered into between the second appellant and second respondent with the consent of both the first respondent and first appellant.

[30] Apparently, work had already commenced pursuant to PMSA1 before PMSA2 was executed and payment certificate No 1–23 were issued by the first respondent. It is our finding that the learned arbitrator was factually and legally right in finding that the first appellant and first respondent are both liable to each other under PMSA1 and their agents, the second appellant and the second respondent under the PMSA2. The learned arbitrator did not err in finding that the first appellant and first respondent are the proper parties in the international arbitration via PMSA1, whilst the second appellant and the second respondent were in the same international arbitration in their capacity as agents to their principals, the first appellant and the first respondent.

[31] It may not be unusual for companies within the same group to be involved in carrying out various parts of a project, even without formal contracts setting out their roles. We have read the principles laid down in the case of *Dow Chemical France and Ors v Isover Saint Gobain* (ICC Award No 4131, YCA 1984) at 131 et seq91. This is a case where the doctrine of 'group of companies' was revealed where the arbitrators found that the

arbitration agreement directly entered by certain companies might bind other entities of their group if the latter appear to be true parties to the arbitration agreement because of their participation in the negotiation, performance or termination of the agreement provided that this is in accordance with parties' intention.

[32] Our attention was brought to the case of *Padda Gurtaj Singh & Ors v Axiata Group Bhd & Ors* [2022] MLJU 526; [2022] MLRHU 454 where the *Dow Chemical* principle was discussed. In that case, Ong Chee Kwan JC (as His Lordship then was) had cited the Indian Supreme Court case of *Mahanagar Telephone Nigam Ltd v Canara Bank & Ors* 2019 SCC Online SC 995 which allowed the inclusion of a non-signatory party to a single composite arbitration by invoking the 'Group of Companies' doctrine. In that case, the circumstances in which such doctrine can be invoked by the courts was laid down by the High Court. In his judgment the learned JC (as His Lordship then was) stated the followings:

> [85] International arbitral tribunals recognise the concept that when one company in a group of companies signs an arbitration agreement, that agreement can in some cases extend to bind other companies within the same group. The principle is often called the 'Dow Chemicals' principles named after the decision of the ICC Court of Arbitration in Paris in Dow Chemicals v Isover-Saint-Gobain, ICC Award No 4131.
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> [86] The Indian Supreme Court in *Mahanagar Telephone Nigam Ltd v Canara Bank & Ors* 2019 SCC Online SC 995 allowed the inclusion of a non-signatory party to a single composite arbitration by invoking the 'Group Companies' doctrine. It laid down the circumstances in which such doctrine can be invoked by the Courts. After referring to the ICC award in *Dow Chemicals* (at 10.4), the court observed as follows:
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> > 10.4 ...
> >
> > *The 'Group of Companies' doctrine has been invoke by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group.*
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> > *The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non- signatory will also be bound and benefitted by the relevant contracts.*
> >
> > *The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory*

to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

A 'composite transaction' refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.5 The Group of Companies Doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group. (Emphasis added.)

[33] It is our considered view and based from the facts and law found by the learned arbitrator, the learned High Court judge erred in setting aside the award on the ground that there is no single arbitration agreement made between all four parties herein and to refer the PMSA1 and PMSA2 to the arbitral tribunal at all material time and not valid within the definition of arbitration agreement under s 9(1) of the Act. We find that PMSA2 is a supplementary or collateral agreement, exist contemporaneously with the principal agreement, PMSA1. We further find that the first appellant and first respondent had consented, through their conduct, assigned their contractual obligation under the primary agreement, PMSA1 to their respective nominee, namely the second appellant and second respondent with the aim to facilitate the administration of contract.

[34] In setting aside the award, the learned High Court judge further agreed with the respondents' argument that the dispositive portion of the award failed to identify a party to perform the award and a party to be benefitted from the award, resulting in it being uncertain as to its meaning, effect, impact and/or duties imposed. We find that the learned High Court judge misdirected himself by wrongfully interpreting the ratio decided by the Federal Court in *Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors* [2020] 3 MLJ 1; [2020] 5 CLJ 143. In that case, the Federal Court held that the operative word in s 38 of the Act (ie the provision for recognition and enforcement of award) which is 'in terms of the award' indicates not the entire award but the dispositive portion that contains the decision of an award only. Hence, the material part of the award which is capable of being registered to be recognised and enforced as a judgment is the dispositive portion of the award on its own, to uphold the very nature of confidentiality of arbitration. On the contrary, in the present matter, in view of the findings of the learned arbitrator as stated earlier, there is no

confusion at all in the dispositive portion of the award. We find that the dispositive portion of the award is clear in that the first respondent being the principal to the second respondent is liable to the first appellant being the principal to the second appellant. The award must be read in totality in determining the respondents' application to set aside the award which was made strictly pursuant to s 37 and not s 38 of the Act. As such the appellants duly complied with the case cited by the learned High Court judge in *Siemens Industry Software GmbH & Co KG (Germany)*.

[35] Additionally, the learned High Court judge failed to consider that the appellant in the Enforcement and Recognition Court vide KCH-24C(ARB)-2/5 of 2021 (HC2) had duly registered only the dispositive portion and not the entire award. It must be reiterated that the present application was made by the respondent in the High Court pursuant to s 37 of the Act ie to set aside the award by the arbitral tribunal. Therefore, given that the recognition and enforcement court has approved the dispositive portion of the award to be registered as the court order dated 15 June 2021, the allegation that the uncertainty contained in the dispositive portion of the award is a non-issue. Further, the appellants cannot be said to be unjustly enriched at the expense of the first respondent by receiving damages under the award. Based on the agency principle, the first respondent as the principal and controller to the second respondent is to be held liable to pay the awarded sum to the first appellant being the principal to the second appellant.

[36] It must be borne in mind that the learned arbitrator had made finding of facts and law and any attempt to revisit the findings is not permissible in law. The courts do not sit in appellate capacity and must be slow in intervening even there is discretion to do so. In *Hindustan Oil Exploration Co Ltd v Hardy Exploration & Production (India) Inc* [2023] 4 MLJ 113; [2023] 4 MLRA 338, this court through the judgment of Azimah Omar JCA had stated that:

> [36] ... It is trite law that the court ought not to descend from the bench and enter into the arbitral arena to disturb the arbitral tribunal's determinations and findings on merits.
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> ...
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> [47] This court takes cognizance that s 37 of the AA 2005 is based on article 34 of the Model Law. In adopting the Model Law's provision, the Malaysian courts do not have the right to review the merits or correctness of an arbitral tribunal's decision.
>
> [48] It must also be acknowledged that the arbitral tribunal's decision is final and binding on the parties. On this score, any errors of law and fact made by the arbitral tribunal is not appealable. In such instance, the Malaysian's courts do not and must not sit in appeal over the arbitral tribunal's decision.

[37] It is apposite to note that the authority or competence of the arbitral

tribunal comes from the agreement of the parties. The authority/competence cannot come from other sources. The parties herein have given the authority to the arbitral tribunal to decide disputes between them. Based on the spirit of the Act which essentially is a framework for the recognition and enforcement of arbitral awards, the award herein must be affirmed. We further agree with the appellants' submission that the award must be affirmed as it is instrumental in the transition from a restrictive interpretation of consent focusing on its express manifestation to a more flexible approach attaching the necessary relevance to implied consent and more attentive to the needs of complex contractual scenarios in line with the prevailing worldwide international arbitration view as opposed to the ancient time narrow interpretation. We do not find that the learned arbitrator had applied the wrong regime of law and she had not gone wrong with respect to the proper parties to the arbitration. We find that the core principle as to the need for an arbitral agreement required by s 9(1) of the Act exist in the form of PMSA1 and PMSA2 each being a complete agreement for the same rights and obligations, for the same scope of works.

[38] The learned High Court judge further found that there was a breach of the rules of natural justice based on the manner the arbitration proceedings were said to have been conducted particularly in the learned arbitrator's finding that the second appellant and second respondent are the agent to their principal, the first appellant and first respondent relying on the 'implied agency' principle which was said to have not been pleaded by the appellant and was only advanced by way of tribunal queries after the close of parties written submission. The respondents contend that they were not given and/or were deprived of a fair and reasonable opportunity to defend and/or argue extensively on the application of the agency arguments proffered by the appellants. The respondents submit that the acceptance of the appellants agency arguments by the learned arbitrator without giving a fair and reasonable opportunity to the respondents to rebut/or argue on the same:

(a) constitutes a deprivation of the respondents' rights to be heard in the arbitration proceedings;

(b) constitutes a breach of the arbitral tribunal's duty pursuant to s 20 of the Act;

(c) has resulted in a patent injustice;

(d) has resulted in a blatant disregard of the most basic notion of natural justice; and/or

(e) has resulted in a breach of the rules of natural justice in relation to arbitration proceeding or the making of the award.

[39] We are guided by the Federal Court case of *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 6 MLRA 51. In that case, the

Federal Court has stated that whether a breach of natural justice is sufficient to render an arbitral award to be set aside, the breach must be significant or serious such as to have had an impact on the outcome of the arbitration. The guidelines laid down by the Federal Court are as follows:

> [53] In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows: First, the court must consider:
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> (a) which rule of natural justice was breached;
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> (b) how it was breached; and
>
> (c) in what way the breach was connected to the making of the award;
>
> Second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;
>
> Third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;
>
> Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;
>
> Fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
>
> Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
>
> Seventh, the discretion given to the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and
>
> Eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.

[40] In *Master Mulia Sdn Bhd* there were two pieces of extraneous evidence which the Court of Appeal found to be relevant and material to the issue of causation of the damages. These evidence were considered by the arbitrator without informing the parties until the award was rendered, by which time it was too late. As such, the case which had been submitted for arbitration had been redefined by the arbitrator without giving the parties the opportunity to present their responses. The Federal Court therefore agreed with the Court of Appeal that without these two pieces of extraneous evidence which were never

put to the parties, the arbitration would also have reached a different outcome. The Federal Court found that the Court of Appeal was correct in setting aside the entire award on the basis that the breach had materiality and causative effect on the outcome of the arbitration.

[41] We have scrutinised the cause papers, the proceedings in the arbitral tribunal (the lines of questioning of appellants' counsel) and written submissions of the parties herein. We find that from the commencement of the arbitration, the appellants' stance is apparent in that the first respondent has entered PMSA1 with the first appellant and their nominees the second respondent and second appellant had entered PMSA2 which is a supplementary agreement to facilitate the contract. The stance taken by the appellants is not something extraneous that was taken into consideration by the learned arbitrator and was not raised for the first time during the tribunal queries No 1. We find the appellants have been consistent in their stance whilst the respondents for that matter have been consistent in disputing the stance. Importantly, there was nothing to stop the respondent from further replying to or rebut the position taken by the appellants. We find that there was a reply filed by the respondents after tribunal's queries No 1 but upon perusal of the respondents' reply No 2 subsequent to their reply No 1, rebuttal to the appellants' reliance on the principle of agency did not surface. In fact, there were four written submissions by the respondents prior to the delivery of the award which we found to be thorough where all issues were fully addressed. We cannot avoid to observe that the objection relating to the agency principle arose after the change of the respondents' solicitor.

[42] We further find that the respondents have failed to demonstrate how different would the outcome of the arbitral tribunal be if they were given reasonable opportunity to defend and/or argue 'extensively' on the application of the agency arguments proffered by the appellants.

CONCLUSION

[43] The courts must adhere to the policy of encouraging arbitral finality and minimalist intervention and it is our considered view that the decision of the High Court in setting aside the award is plainly wrong warranting the court's intervention. Premised on the foregoing, we unanimously find that there is no compelling grounds necessitating the setting aside of the award.

[44] We therefore allowed the appellants' appeal with costs of RM40,000 subject to allocator, uphold the award and set aside the High Court's decision.

A *Appeal allowed.*

Reported by Nabilah Syahida Abdullah Salleh

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